No. 74

Supreme Court of the United States

OCTOBER TERM, 1963

SOUTHERN RAILWAY COMPANY, *Appellant*

v.

STATE OF NORTH CAROLINA; DUKE UNIVERSITY; THE DURHAM CHAMBER OF COMMERCE, INC.; RESEARCH TRIANGLE INSTITUTE; ERVIN MILLS, INC.; and MARY TRENT SEMANS, *Appellees*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

BRIEF FOR THE APPELLANT SOUTHERN RAILWAY COMPANY

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OPINIONS BELOW

The opinion of the district court (R. 634) is reported at 210 F. Supp. 675. The report of the Interstate Commerce Commission (R. 10) is reported at 317 I.C.C. 255. The report and recommended order of the Commission's hearing examiner appear at R. 25.

JURISDICTION

This suit was brought by appellees under 28 U.S.C. §§ 1336, 1398 and 2321-2325 to set aside an order of the Interstate Commerce Commission. Trial was held

before a three-judge court convened under 28 U.S.C. § 2284. The judgment of the district court in setting aside the Commission's order and permanently enjoining appellant from acting thereunder was entered on October 19, 1962. On December 14, 1962, a notice of appeal to this Court was filed in the district court.

The jurisdiction of this Court to review the decision below is conferred by 28 U.S.C. §§ 1253 and 2101(b). This Court noted probable jurisdiction of the appeal on May 13, 1963.

STATUTE INVOLVED

Section 13a(2) of the Interstate Commerce Act, 72 Stat. 572, 49 U.S.C. § 13a(2), reads as follows:

> "Where the discontinuance or change, in whole or in part, by a carrier or carriers subject to this part of the operation or service of any train or ferry operated wholly within the boundaries of a single State is prohibited by the constitution or statutes of any State or where the State authority having jurisdiction thereof shall have denied an application or petition duly filed with it by said carrier or carriers for authority to discontinue or change, in whole or in part, the operation or service of any such train or ferry or shall not have acted finally on such an application or petition within one hundred and twenty days from the presentation thereof, such carrier or carriers may petition the Commission for authority to effect such discontinuance or change. The Commission may grant such authority only after full hearing and upon findings by it that (a) the present or future public convenience and necessity permit of such discontinuance or change, in whole or in part, of the operation or service of such train or ferry, and (b) the continued operation or service of such train or ferry without discontinuance or change, in whole or in part, will constitute an unjust and

undue burden upon the interstate operations of such carrier or carriers or upon interstate commerce. * * *"

QUESTIONS PRESENTED

The following questions are presented by this appeal:

1. Whether Section 13a(2) of the Interstate Commerce Act precludes the Interstate Commerce Commission from authorizing discontinuance of the operation of an intrastate passenger train which is run at a substantial deficit and for which there is little public demand, without giving effect to the freight earnings of the particular line?

2. Whether the court below exceeded the scope of its review function in substituting, on the basis of undisputed evidence, its own determinations as to public convenience and necessity and undue burden upon the carrier's interstate operations for those of the Interstate Commerce Commission?

STATEMENT

Pursuant to the provisions of Section 13a(2) of the Interstate Commerce Act appellant Railway Company, on April 6, 1961, filed a petition with the Interstate Commerce Commission requesting permission to discontinue a pair of intrastate passenger trains between Greensboro and Goldsboro, North Carolina.[1] A

[1] These trains were made up of equipment that was used on once-a-day eastbound and a once-a-day westbound run between the two towns, which are about 130 miles apart by rail. On July 8, 1959, Southern had filed a petition with the North Carolina Utilities Commission for permission to discontinue this service, which constituted all the passenger rail service between the two towns. That petition was denied and the denial was sustained by the North Carolina Supreme Court in North Carolina v. Southern Ry. Co., 254 N. C. 73, 118 S.E.2d 21 (1961).

public hearing was held before one of the Commission's hearing examiners and Southern submitted evidence showing that there was a lack of present or future public convenience and necessity in the continued operation of the passenger trains and that the continued operation of the trains constituted an undue and unjust burden upon its interstate operations. Several protestants, who constitute the present appellees, intervened and submitted evidence and testified in opposition to the petition.

On October 27, 1961, the Commission's hearing examiner filed his detailed report and recommended order finding *inter alia* that the overwhelming majority of the passenger stations served by the 130-mile line "averages less than one passenger a day" (R. 30); that the direct expenses of operating the once-a-day east-west train service were eight times the passenger revenues derived from the operation (R. 31, 32); that the net savings "to be realized from the discontinuance of these [two] trains would be at least $90,589 a year" (R. 39); that the average number of passengers per train mile of operation and the average number of skilled employees working on the train per train mile operation were approximately seven (R. 30, 31); that daily airline service is available at the Raleigh-Durham and the Greensboro-High Point Airports between the area served by the trains and major cities (R. 33); that other rail passenger service was available at four of the stations served by the trains; and that adequate daily motor bus service was available between Greensboro and Goldsboro consisting of "15 motor buses [which] operate daily in each direction between Greensboro and Raleigh and eight between Raleigh and Goldsboro" (R. 33, 34). On the basis of these and other detailed findings, the hearing

examiner determined that the operation of the trains resulted in a net loss to Southern, that adequate alternate means of public transportation existed, and that the public demand for the two passenger trains was slight and had declined sharply since 1948. The hearing examiner, therefore, recommended that the petition to discontinue the trains in question be granted and that such discontinuance was consistent with present and future public convenience and necessity and that the continued operation of the trains would constitute an undue and unjust burden on Southern's interstate operations as well as an undue burden on interstate commerce.

On June 27, 1962, the Interstate Commerce Commission filed a report in which it adopted the findings and recommended conclusions of its hearing examiner and thereupon issued an order authorizing the discontinuance. Appellees petitioned for reconsideration of the order on July 16, 1962. On July 20 the Commission postponed the effective date of its order of June 27, 1962, so that it might adequately determine the merits of the petition for reconsideration. After reconsidering the record, the Commission, on August 6, 1962, denied the petition for rehearing and ordered the petition for discontinuance of the two passenger trains be made effective 15 days hence.

On August 28, 1962, appellees instituted an action in a three-judge district court seeking to set aside and enjoin the order of the Interstate Commerce Commission. On October 19, 1962, that court handed down its opinion and judgment, which set aside and annulled the Commission's order and "permanently and perpetually enjoined" Southern from discontinuing the pair of passenger trains. The court found that the

Commission had violated Section 13a(2) in failing to take into account profits from freight operations on the line between Greensboro and Goldsboro, and that there was not sufficient evidence to support the conclusion of the Commission as to undue burden and public convenience and necessity.

SUMMARY OF ARGUMENT

The threshhold and dispositive question turns on the meaning of Section 13a(2) of the Transportation Act of 1958 insofar as that section governs the discontinuance of intrastate passenger trains. Section 13a-(2) empowers the Commission to order the discontinuance of a "train" operated "wholly within the boundaries of a single State" if the state has first refused permission or failed to act upon an application within 120 days, and if the Commission, after a public hearing, finds (1) that discontinuance of the train is consistent with the present or future public convenience and necessity, and (2) that the continued operation of the train will constitute an undue burden upon the interstate operations of the carrier or upon interstate commerce.

In enacting Section 13a(2) Congress intended that interstate railroads might discontinue loss-producing intrastate passenger trains for which there was little public demand and that such discontinuance was to be judged on the basis of the deficit produced by the specific train. This is the only standard that is in accord with or permitted by the clear language of the statute and by the plain teaching of the legislative history. There is simply no authority anywhere for reading a requirement into Section 13a(2) that an unwanted loss-producing passenger train must be continued if the

profits from the freight operations on the line offset the loss produced by the passenger train.

In addition to misreading the plain meaning of Section 13a(2), the court below usurped the administrative function of the Commission when, in reviewing the determination of the Commission, the court drew its own ultimate conclusions as to matters confided to the Commission's judgment—whether the public convenience and necessity permitted discontinuance of Southern's trains and whether their continued operation would constitute an unjust and undue burden on interstate operations. Moreover, such contrary ultimate conclusions were drawn by the court on the basis of a record which the court acknowledged was complete and on the basis of subsidiary findings which the court accepted as correct and not in conflict.

ARGUMENT

I.

UNDER SECTION 13a(2) OF THE INTERSTATE COMMERCE ACT AS ADDED BY THE TRANSPORTATION ACT OF 1958, THE INTERSTATE COMMERCE COMMISSION MAY PERMIT THE DISCONTINUANCE OF THE INTRASTATE OPERATION OF A PASSENGER TRAIN AS AN UNJUST AND UNDUE BURDEN UPON THE RAILROAD AND UPON INTERSTATE COMMERCE, WHERE THERE IS LITTLE PUBLIC DEMAND FOR SUCH TRAIN, AND WHERE THE TRAIN IS OPERATED AT A SUBSTANTIAL LOSS, IRRESPECTIVE OF THE PROFITS EARNED BY THE FREIGHT SERVICE OPERATED ON THE SAME INTRASTATE LINE.

The Transportation Act of 1958 was enacted by Congress in an attempt to eliminate some of the causes of the serious financial situation faced by the country's railroads. One of the principal causes of the carriers' ills was the loss suffered in the operation of passenger

trains. The "passenger deficit" was estimated to amount to as much as $700,000,000 a year. H. R. Rep. No. 1922, 85th Cong., 2d Sess., 11. And a major contributing cause of the deficit was the inability of the carriers, in some cases, to discontinue operation of unneeded and unprofitable passenger trains. Prior to 1958, the authority to permit the discontinuance of trains, whether intrastate or interstate, was vested in the individual states; and the only discontinuance authority granted to the Interstate Commerce Commission was, under Section 1(18) of the Interstate Commerce Act, to permit the complete abandonment of a given line. Thus, unless a carrier wished to cease both freight and passenger service on a given line, the discontinuance of a particular service required the permission of all of the states in which the service was performed.[2]

In the Transportation Act of 1958, Congress added Section 13a(2) to the Interstate Commerce Act, authorizing the Interstate Commerce Commission to permit a railroad to discontinue the operation of an intrastate passenger train where permission to discontinue such train had been denied or not acted upon within a 120-day period by the state, if, after a hearing, the Interstate Commerce Commission found (1) that the present and future public convenience and necessity permit such discontinuance, and (2) that the continued operation of *"such train"* constitutes an unjust and undue burden upon the interstate operations of the railroad or upon interstate commerce.

Acting pursuant to Section 13a(2), the Interstate Commerce Commission permitted Southern to discon-

[2] For a discussion of this background, see New Jersey v. New York, S. & W.R.R., 372 U.S. 1, 5.

tinue a pair of intrastate passenger trains operated in North Carolina. The Commission found that the substantial deficit resulting from the operation of the trains, and the fact that there was little or no public demand for the passenger service provided by them, resulted in an unjust and undue burden upon Southern's interstate operations and upon interstate commerce.[8] The Commission declined to give any weight to the intervenors' assertions as to the profit realized by Southern's operation of a freight service over the tracks on which the passenger trains were operated (R. 13, 14). Given the lack of public demand for the trains, the Commission also declined to regard as significant the profits realized by Southern on its overall operations (R. 16). In reversing the Commission, the court below ruled that "as a matter of law, [under Section 13a(2)] we think the Interstate Commerce Commission cannot be said to have made a proper finding unless it takes into account the profits that Southern Railway makes in its freight operations on the same line." (R. 640, 647).

The question, which is one of first impression before this Court, is whether Section 13a(2) required the Commission to take into account the profits earned by the freight service operated over the same tracks as the passenger trains which Southern sought to have discontinued. It is submitted that the statutory language and the relevant legislative history illustrate the clear error committed by the court below in requiring that freight operations on the line should be taken into account in determining whether the passenger trains are to be discontinued.

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[8] The Commission also made the requisite finding as to the public convenience and necessity. The district court's treatment of that finding is discussed in Part II of this argument.

The background of and the reason for the enactment of the statutory language embodied in Section 13a(2) are found in the committee reports that accompanied what was to become Section 13a(2). The Report of the Senate Committee on Interstate and Foreign Commerce pinpoints the fact that it was the purpose of Congress to free the railroads from deficit passenger services which could be operated only at the expense of the profits derived from other operations:

> "A most serious problem for the railroads is the difficulty and delay they often encounter when they seek to discontinue or change the operation of services or facilities that no longer pay their way and for which there is no longer sufficient public need to justify the heavy financial losses entailed. The subcommittee believes that the maintenance and operation of such outmoded services and facilities constitutes a heavy burden on interstate commerce." S. Rep. No. 1647, 85th Cong., 2d Sess., p. 21.

The report accompanying the House version of the bill also illustrates a standard based solely on the particular deficit service. Thus the report states:

> "A major cause of the worsening railroad situation is the unsatisfactory passenger situation. Not only is the passenger end of the business not making money—it is losing a substantial portion of that produced by freight operations."
>
> * * *
>
> "It is obvious that in very great measure these passenger losses are attributable to commuter service. It is clear that where such necessary services cannot be made to pay their way, the interested communities have a very real interest in working out the problem. It would seem evident that if such urban or inter-urban commuting service must

be preserved, losses incurred will have to be met in some way by the communities. It is unreasonable to expect that such service should continue to be subsidized by the freight shippers throughout the country.

"There are substantial losses, however, occurring in passenger service beyond those attributable solely to commuter service. Where this passenger service—and passenger service means more than merely transportation of passengers, and involves 'head end' service, such as baggage, mail and express—cannot be made to pay its own way because of lack of patronage at reasonable rates, abandonment seems called for." H. R. Rep. No. 1922, 85th Cong., 2d Sess., pp. 11-12.

These reports establish that Congress intended to permit the discontinuance of a given passenger train that no longer paid its own way and was little used by the public. In other words, Congress rejected the idea that unused and unneeded deficit-producing passenger trains should be continued by subsidizing their operations out of freight profits.

A subsidiary concern of Congress emerged during the debate on what became Section 13a. That concern was whether the Commission was to be required to allow the discontinuance of any train that was operated at a "net loss" irrespective of the public demand for the service. This is the so-called commuter problem. As first reported to the Senate, Section 13a was worded so that if the facts showed that the continued operation of a given train resulted in a "net loss" to the railroad, the Commission would be required to permit the railroad to discontinue the train, irrespective of public demand and need. 104 Cong. Rec. 10849. Senator

Javits of New York was concerned with the impact of such language on the deficit-producing, but vital, commuter system upon which many large urban areas rely for public transportation. Senator Javits proposed an amendment to remove the requirement of discontinuance on a showing of "net loss." In lieu of that single standard, Senator Javits' amendment authorized the Commission to balance the deficit resulting from the train service against the public need and demand for the service. *Id.* at 10838-10848. Senator Javits' amendment was rejected and the single "net loss" standard remained in the bill as initially passed by the Senate though the Commission's discontinuance authority was restricted to any "train . . . engaged in the transportation of passengers or property in interstate or foreign commerce. . . ." *Ibid.*

The version of Section 13a as reported to the House also contained the single "net loss" standard and was limited to passenger trains operating from a point in one state to a point in another state. The House, however, adopted an amendment offered from the floor by Congressman Harris, Chairman of the House Committee on Interstate and Foreign Commerce, which deleted the "net loss" standard. *Id.* at 12547. Congressman Harris made clear that his amendment did not mean that freight profits would in any way preclude a finding that a deficit from the operation of a passenger train resulted in an undue burden on interstate operations or interstate commerce, when he said, after the section had been amended, that through it "we are trying to get at" the situation in which "the [freight] shippers of this country are making up a deficit every year . . . in losses in passenger services." *Id.* at 12551.

Thereafter, since the Senate and House versions of Section 13a differed, the two bills were referred to conference. There the single "net loss" standard was removed, and Section 13a was broken up into two paragraphs. The first paragraph was made applicable to the interstate operation of trains, and paragraph 2 applied to trains operated "wholly within the boundaries of a single state." The conference version of the bill was then adopted by the House and Senate and became what is now Section 13a. In the Senate, Senator Javits discussed the conference version of the bill and commented that the text now "provided by the bill as to the discontinuance of any commuter service—because that was what troubled us particularly—is that it would constitute an undue burden upon the operation of such carrier, or carriers, or upon interstate commerce. As I construe that provision, the Commission would have to look at the overall situation of the entire Railroad in order to determine the inequity of requiring it to continue a particular commuter branch." *Id.* at 15529.

Thus, the statutory text, the committee reports and the Congressional debates establish that Section 13a(2) directs the Commission to weigh the public need and demand for a particular train service as against the burden imposed upon the carrier as a result of the financial loss stemming from the operation of the particular train. There is no suggestion that the earnings from the freight operations upon the same line must be taken, or indeed are properly to be taken, into account in determining whether a particular passenger train is to be discontinued. It is, of course, well recognized that the overall financial condition of the carrier is properly taken into account in considering

whether to discontinue a deficit-producing passenger train for which there is heavy public demand, *i.e.*, commuter trains. It is equally clear that this is not the proper test when the public use and demand for the passenger train service are meager. This test is not at issue here, for not only has it been the consistent position of the Commission, but it was recognized by the court below, that it would be "unfair to compare the loss from a particular segment of a passenger rail line to the total profit of the company. Nor is this the test." (R. 654) The legal error committed below was that the court determined that the proper test was whether the total operations on the particular segment of railway involved, which is to say the freight operations plus passenger service, contributes its fair share to the overall company operation. As we have shown, the correct question is whether the particular passenger train or trains, discontinuance of which is sought, contribute to the overall company operations or whether they constitute a burden on the company and on interstate commerce.

Operation of the two passenger trains which Southern seeks to discontinue was found by the Commission to result in an annual net loss of at least $90,000 (R. 31). In permitting the discontinuance, the Commission found that such a loss was not justified by the minuscule public demand of an average of seven passengers per train mile, and that what little use there was, was adequately provided for by alternative motor bus, airplane and highway facilities (R. 17). The court below voided the discontinuance on the ground that the profitable freight operations meant that the continued operation of the two trains could not constitute a burden on interstate commerce and the freight

service made the line as a whole contribute to Southern's operations.

On the basis of its expert acquaintance with Section 13a(2) of the 1958 Act, the Interstate Commerce Commission has consistently rejected, as it did in the instant case, the idea that freight earnings or profits are to be taken into account in determining whether a particular passenger train is to be discontinued. *Great Northern Ry. Co., Discontinuance of Service*, 307 I.C.C. 59, 69 (1959). In *Southern Pacific Co., Partial Discontinuance*, 312 I.C.C. 631, 633-34 (1961), the Commission held that:

> "The burden (upon the carrier's interstate operations or upon interstate commerce, as expressed in section 13a(2)) . . . is to be measured by the injurious effect that the continued operation of the train proposed for discontinuance would have upon interstate commerce. As is indicated by its legislative history, the purpose of section 13a(2) is to permit the discontinuance of the operation of services that 'no longer pay their way and for which there is no longer sufficient public need to justify the heavy financial losses involved.' (S. Rep. 1647, 85th Cong.) Nowhere in section 13a(2) or elsewhere in the law is there any requirement that the prosperity of the intrastate operations of the carrier as a whole, or any particular segment thereof, must be given effect in determining whether the operation of an individual intrastate train imposes an unjust and undue burden on interstate commerce. To hold otherwise would be contrary to the apparent intent of the Congress."

Other cases involving orders of the Commission granting relief under Section 13a(2) have been sustained by three-judge district courts. *City of Phila-*

delphia v. *United States*, 197 F. Supp. 832 (E.D. Pa. 1961); *Montana* v. *United States*, 202 F. Supp. 600 (D. Mont. 1962); *California* v. *United States*, 207 F. Supp. 635 (N.D. Cal. 1962). In none of these has the standard of freight profit and overall financial soundness been applied. As correctly phrased by the court in the *Montana* case, the issue was whether "the losses from the operation of the trains in question are substantial and continuing and few people patronize the service . . . [and] adequate alternative transportation is available."

The decision of the court below perpetuates the very thing which Congress intended to end—the subsidizing by freight service profits of deficit-producing passenger services for which there is little public demand. The court below appeared to believe that the result it reached was required by two decisions of this Court, *Chicago M. St. P. & P. R. Co.* v. *Illinois*, 355 U.S. 300, and *Public Service Commission* v. *United States*, 356 U.S. 421. Both of these decisions arose under Section 13(4) of the Interstate Commerce Act prior to its amendment by the Transportation Act of 1958. Section 13(4) authorizes the Commission to order an increase in intrastate rates where such rates unjustly discriminate against interstate commerce. In both *Chicago* and *Public Service*, the Court held that the Commission erroneously found discrimination against interstate commerce when it did not consider the earnings from the total intrastate operation. (The 1958 Act amended Section 13(4) to make clear that the Commission need not take into account the total intrastate operation.) The court below concluded that the instant case stands "in an *a fortiori* relationship to" the *Chicago* and the *Public Service* cases "[f]or to

allow passenger service to be abandoned [under Section 13a(2)], as contrasted to raising passenger fares [under Section 13(4)], involves a far more serious incursion upon the traditional rights of the states." (R. 641)

In other words, the device used by the court below to force its conclusion was that the "'undue burden' standard contained in section 13a(2) derives from section 13(4) of the Act . . . ."[4] Therefore, since the *Chicago* and *Public Service* cases had read Section 13(4) as requiring that all intrastate operations (*i.e.*, passenger trains *and* freight operations) be taken into account, and since that interpretation of Section 13(4) had been eliminated by the 1958 Act, the court below was able to argue that Congress' failure similarly to spell out what findings need not be made under Section 13a(2) meant that the *Chicago* and *Public Service* interpretation attached to that section. There are a number of factors which establish the erroneous nature of this overreached line of reasoning.

First, the phrase "undue burden" is the time-honored language that has been used by the Congress to refer to the regulatory activities of all Federal regulatory agencies concerned with the countless aspects of interstate commerce. It is one of the most common jurisdictional prerequisites to Federal regulation of interstate activities. In short, we have discovered nothing to support the statement of the court below that the undue burden language of Section 13a(2) "derives" from Section 13(4).

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[4] In fact, "undue burden" was introduced into the text of § 13(4) by the 1958 Amendment, although the phrase had theretofore been used judicially as a shorthand way of stating what the Commission must find to justify altering intrastate rates.

In the second place, Congress relieved the Commission in cases arising under Section 13(4) of the burden of separating intrastate operations from interstate operations which had been imposed by the *Chicago* and *Public Service* cases. It did so by adding language which permitted the Commission to find discrimination "without a separation of interstate and intrastate property, revenues, and expenses and without considering in totality the operations or results thereof of any carrier, or groups of carriers wholly within any State." The history of this addition shows that the added text was not designed to give a new or special or different meaning to the phrase "undue burden," but rather to clarify what had been the original purpose of Section 13(4), since "it is the possible interpretation of these recent court decisions [*i.e.*, the *Chicago* and the *Public Service* cases] that would create a change in the present regulatory scheme." H. R. Rep. No. 2274, 85th Cong., 2d Sess., 12. The Section 13(4) derivation argument adopted below is also answered by the very language Congress enacted in Section 13a(2): *i.e.*, that the "undue burden" must be found in "the continued operation or service of *such train.*" This statutory reference to the operation of a train is certainly anything but a direction to the Commission to consider the "result of the total operations of the intrastate lines" in Section 13a(2) cases, as the court below concluded (R. 642-643).

In the third place, if the just-quoted holding of the court below were correct, it is difficult to see how such a proposition supports the requirement imposed below that the Commission take into account Southern's profit from the freight service on the line in question. What should follow from the court's conclusion is that

the Commission should have considered the total profit made by Southern from all of its intrastate operations in North Carolina, and this is so plainly at odds with the statutory language and the Congressional purpose as to be unthinkable.

The fourth factor on which the Section 13(4) derivation argument breaks is seen in Section 13a(1). That section, as noted earlier, empowers the Commission to require continuance where there has been a discontinuance of a train "operating from a point in one state to a point in any other state," where such train is "required by public convenience and necessity and will not unduly burden interstate or foreign commerce." Clearly, if there is a parallel to the "undue burden" in Section 13a(2), it is "unduly burden" in Section 13a(1), since both are products of the same act of Congress. It has yet to be suggested that the "unduly burden" test of Section 13a(1) requires the application of a freight profit factor derived from interstate and foreign freight operations.

Although perhaps it is only of footnote importance, the court below so applied its erroneous freight profit standard as to require reversal even had that standard been correct. This follows from the fact that the Commission had not considered the intrastate freight profit standard and the court below was compelled to acknowledge that there were no "figures relating to freight profits in the record." (R. 655)

No findings had in fact been made with respect to such freight profits and apparently no financial data specifically relating thereto had been submitted by the protestants. All the hearing examiner had noted was that the "protestants emphasized the fact that . . . [Southern's] net income alone from freight opera-

tions on the line between Greensboro and Goldsboro averages $630,000." (R. 37) The Commission itself merely noted that "interveners allege that petitioner's net income from its freight operations over the line must be given effect when considering whether the continued operation of its passenger trains Nos. 13 and 16 will constitute a burden on interstate commerce." (R. 13-14)

The court below was thus in a dilemma in applying its new standard, since there were no findings in point. Accordingly, the court undertook to make an independent finding, *viz.*, "On this same line of track the railroads made a net freight operating profit of $630,000 in 1960." (R. 653-54) The court itself then stated that this profit was "apparently arrived at by taking 61% of the Southern Railway's average freight profits per mile multiplied by the total Greensboro-Goldsboro mileage." (R. 655) This 61% factor represents a comparison of intrastate and interstate freight traffic density on the line with Southern's total average traffic density (R. 374). It would have been erroneous for the Commission to find that solely because the interstate *and* intrastate traffic density on the line was 61% of the average system traffic density, the intrastate freight profits on the line would be 61% of total average freight profits per mile. The equation is meaningless. Nevertheless, it constitutes the sole basis of the finding of the court below.

II.

THE COURT BELOW INVADED THE PROVINCE OF THE COMMISSION BY MAKING ITS INDEPENDENT DETERMINATION OF WHAT THE PUBLIC CONVENIENCE AND NECESSITY PERMIT AND THE EXTENT OF THE BURDEN OF CONTINUED OPERATION ON INTERSTATE OPERATIONS AND INTERSTATE COMMERCE.

Setcion 13a(2) of the Interstate Commerce Act confides to the informed judgment of the Interstate Commerce Commission the determination whether the public convenience and necessity permits the discontinuance of an intrastate train and whether continued operation will constitute an unjust and undue burden upon the interstate operations of the carrier or upon interstate commerce. Procedural errors aside—and the court below correctly found there was none (R. 636-639)—unless the Commission made a clear mistake of law in reading the governing statute or its ultimate conclusions are not supported by adequate subsidiary findings or those findings are not supported by substantial evidence, the reviewing court may not interfere with the Commission's judgment. As this Court said of Section 1(18) of the Act, closely related to Section 13a(2) in providing for Commission authorization of abandonment of all operations over a rail line where it finds that the public convenience and necessity permit of such abandonment:

> "The making of this determination involves an exercise of judgment upon the facts of the particular case. The authority to find the facts and to exercise thereon the judgment whether abandonment is consistent with public convenience and necessity, Congress conferred upon the Commission." *Colorado* v. *United States,* 271 U.S. 153,

166. See also *ICC* v. *Parker*, 326 U.S. 60, 65; *United States* v. *Detroit Navigation Co.*, 326 U.S. 236, 241.

In form the court below acknowledged the limited scope of its review (R. 639). In form it found that the basic facts were not in conflict and that there was no real conflict in the evidence; and it accepted the Commission's findings of subsidiary facts (R. 656-657). In form it purported to set aside the Commission's ultimate conclusion as not supported by substantial evidence and not in accordance with law (R. 656). In fact, however, it made an independent reappraisal of the evidentiary facts and of the Commission's findings on those facts and of the significance of the findings to the Commission's ultimate conclusions and thus, in the end, made its own determination of whether the statutory standards were satisfied. The court below thereby usurped the function of the Commission.

A. THE PUBLIC CONVENIENCE AND NECESSITY

The basic facts concerning the public convenience and necessity, as to which the court below found there was no conflict, and the Commission findings on these facts are simple and straightforward. In brief:[5]

In 1948 the two trains making up the roundtrip between Greensboro and Goldsboro carried more than 56,000 passengers, an average of 77 per trip. By 1960 the total number of passengers had declined to fewer than 15,000, or an average of 20 per trip. In the same period passenger revenues fell from $60,000

[5] What follows is drawn both from the Commission's opinion and the report of its hearing examiner, whose findings it adopted (R. 11).

to $21,000, or from about $83.00 per trip to $29.00 per trip. In 1960 the average passenger mile per train mile on the 129 mile run was only slightly more than seven, while the trains are worked by the same number of persons, a five-man railroad crew and a Pullman conductor and a porter (R. 30). As a result of all this the savings to be realized from the discontinuance of the trains (in other words, the present drain on the Southern from operating them) amounts to at least $90,000 a year and very probably considerably more than that (R. 31). The testimony of witnesses opposing discontinuance of the trains showed that there was some use of the service they provide, but such use is insubstantial in view of the density of the population of the area served and the consequent potential patronage (R. 34). Adequate alternative means of transportation will be available. The area served by the trains is traversed by a network of highways, and bus, air and other rail service will continue to be available (R. 33). The Southern did not deliberately discourage use of the trains in order to make a case for discontinuance of service, and its failure to advertise its service is of no consequence since patrons who must be coaxed to use a service have no urgent need for it (R. 16-17, 41). The elimination of the two trains would not have any adverse effect upon industrial growth in the area (R. 17).

In light of all these facts the Commission quite properly concluded that the public convenience and necessity permitted discontinuance of the trains.

The effort of the court below was to minimize these facts, to attempt to explain them away, to disparage their significance and to draw upon other evidence that the Commission adequately considered.

Thus, the district court summarized in twenty-one numbered paragraphs the testimony of the witnesses who said that there was a need for the trains and concluded that "in addition to the need for the services by the general public, the testimony indicated the need existed as to four principal areas: industry, hospital, Duke University, and the U. S. Army." (R. 649-652) The Commission's examiner, whose findings were adopted by the Commission, gave full consideration to this testimony and concluded that the need for the service was "relatively insubstantial" and that the needs of the few witnesses and the few persons for whom they spoke "would be insufficient to justify the institution of a new service" and consequently "their needs no longer justify the continuation of existing service." (R. 40)

The court below further noted that the area served by the trains was growing and said the sharp decline in use of the trains since 1948 appeared "to have bottomed out." (R. 652) This was on the basis of the fact that there was a slight increase in patronage in 1960 over 1959 and a somewhat larger increase in the first five months of 1961. Again, the Commission gave full consideration to these facts, noting that the apparent increase in patronage in 1961 was largely attributable to a greater number of group movements of school children and that the five-month figure did not take into account seasonal variations in use (R. 16). Moreover, the Commission found that despite the larger number of passengers in the first five months of 1961 passenger revenues for the period amounted to less than a third of the wages of the train and engine crews that operated the trains (R. 16, 30-31).

Further, in considering the slight use of the trains, which it could not find was substantial, the court ad-

verted to the claim, rejected by the Commission (R. 16), that Southern had discouraged use of the trains and gave weight, contrary to the Commission's expert judgment that prospective patrons who must be coaxed have no real need for service (R. 17), to the fact that the Southern had done little to promote the use of the trains (R. 653).

Finally, the court discounted the Commission's finding that remaining means of transportation in the area were adequate, on the apparent ground that railroad service should be available on a standby basis regardless of whether there is any continuing use of or need for it (R. 653). The Commission, in its investigation of the very passenger deficit that prompted enactment of Section 13a(2), concluded some time ago that the railroads could not be expected to bear the burden of providing standby capacity for the carriage of passengers. *Railroad Passenger Train Deficit*, 306 I.C.C. 417, 482 (1959).

So it was that the court below came to hold, in its words, that there was no substantial evidence to support the Commission's finding that the public convenience and necessity permitted discontinuance of the two trains. Its holding was thus phrased but actually, as we have shown, what the court did was, on an independent reassessment of the evidence and the Commission's subsidiary findings, to make its own judgment of what the public convenience and necessity permitted. In this it committed the error against which this Court cautioned in *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 536, where it held that a reviewing court "cannot substitute its own view concerning what should be done . . . for the Commission's judgment upon matters committed to its determination, if that has

support in the record and the applicable law." Or, as stated earlier, "The judicial function is exhausted when there is found to be rational basis for the conclusion approved by the administrative body." *Mississippi Valley Barge Line Co.* v. *United States*, 292 U.S. 282, 286-87.

Certainly the judicial function does not extend to what was done here for here the court did not merely look for substantial evidence or a rational basis for the Commission's conclusion but undertook to give its own answer to the question it posed at the outset of this branch of its opinion, "What then is the public convenience and necessity to be served by this railroad."

B. THE BURDEN ON INTERSTATE OPERATIONS AND INTERSTATE COMMERCE

The expressed inability of the court below "to find substantial evidential facts to support the Commission's holding that the service in question constitutes an undue burden upon the interstate aspects of the carrier's operations" (R. 656) is largely a function of its misconstruction of the statute, which has been laid bare in Part I of this argument. That is, by looking not to whether the continued operation of "such train[s]" would result in the proscribed burden, as Section 13a(2) commands, but to whether all of Southern's operations, taken together, over the line on which the trains run are profitable, it was able to conclude that "there is a profit, not a loss, a benefit, not a burden." (R. 654)

In fact, there is a loss—of upwards of $90,000 a year. Such a loss obviously burdens the system-wide interstate operations of Southern. It is a burden "whether at the particular time the system as a whole is profit-

able or unprofitable." *New York Central R.R., Abandonment,* 254 I.C.C. 745 (1944), quoted in *Missouri Pacific R.R., Discontinuance,* 312 I.C.C. 31, 40 (1960). The court below, while adverting to Southern's system-wide profit, correctly held that "it is unfair to compare the loss from a particular segment of a passenger rail line to the total profit of the company. Nor is this the test." (R. 654) Whether the burden of a loss operation is "unjust and undue" depends upon whether the service fulfills a substantial public need. So the Commission has held, *Missouri Pacific R.R., Discontinuance, supra,* and so its hearing examiner said here: "When there is a demonstrated need for the service, the continuation thereof might be justified even at a loss to the carrier." (R. 40) Here the Commission found a demonstrated lack of sufficient need either to justify the service in the public convenience and necessity or to make the burden on interstate operation other than "unjust and undue."

The court below recognized the need for this kind of balancing (R. 653), but in addition ventured its own test: "whether the particular segment of the railway involved is contributing its fair share to the over-all company operations, or whether its share constitutes a burden on the company and on interstate commerce." (R. 654). Leaving aside the basic error, induced by the court's mistaken view of the meaning of the statute, of using the "segment of the railway" rather than the trains sought to be discontinued as the relevant unit, the application of this test to passenger operation on the Greensboro-Goldsboro line was bizarre. The court by computing made a meaningless comparison from figures in the record that Southern's average loss on passenger service was $5,035 per mile,

whereas on the line in question it was only $912 (R. 655).[6] Quite apart from the fact that loss-per-mile is a meaningless figure, the apparent conclusion is that the Greensboro-Goldsboro passenger service is contributing its share because it results in less of a loss than some other passenger segments.[7]

In any event, it is clear that the court below erred in determining that there was no substantial evidence of an unjust and undue burden on interstate operations and interstate commerce. The evidence was plain and undisputed. It led inevitably to the Commission's conclusion that "the continued operation of trains Nos. 13 and 16 would constitute a wasteful service and would impose an undue burden on interstate commerce." (R. 17)

CONCLUSION

The judgment below should be reversed. Since the district court found the facts undisputed and did not invalidate any of the Commission's subsidiary findings but set aside its order because of (1) a mistaken reading of the applicable statute, and (2) an impermissible

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[6] The court was apparently unaware that it was comparing completely dissimilar figures. The average loss per mile on passenger service on the Southern was based on the fully distributed passenger deficit reported to the Interstate Commerce Commission according to its prescribed formula, whereas the average loss per mile on the line in question was based on the excess of direct expenses related only to the operation of trains Nos. 13 and 16 over the revenues made by these trains. The latter included no common expenses.

[7] Equally irrelevant is the court's further recital that revenue per passenger mile for the two trains in 1960 was slightly higher than the system-wide average (R. 655). A train that carried one Pullman passenger one day might have large revenues per passenger mile.

independent redetermination of the ultimate questions confided to the Commission, there is no occasion for a remand except for the purpose of dismissing the complaint. Moreover, should this Court agree with the basic position of the district court, that Section 13a(2) requires an inquiry into freight profits that the Commission did not make, the case should be remanded to the district court with instructions to return it to the Commission to give the agency an opportunity to decide it on a correct view of the law.

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